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the will to determine whether or not the attesting witness shall give testimony as to the execution of the will. This difficulty was not emphasized in the principal case because consent was freely given. If the husband had been given one dollar as a nominal legacy to cut off his rights as heir to a larger sum and so refused to consent, would the will fail for want of a competent witness? The distinction between "incompetency" and "privilege" opens the way for a technical solution. A credible witness under the statute is construed to mean a competent witness. The spouse is at all times competent as a witness although subject to the privilege of the other spouse that no testimony be given without consent. A technical answer is sufficient because the objection is essentially technical. Under the modern statutes the interests of husband and wife are distinct and separate as to property acquired by either by bequest. The purpose of the statute in requiring two "credible witnesses" or competent witnesses to a will is to protect from fraud. The limitation as to who may be a beneficiary is clear; it does not include the husband or wife of a witness. If the public policy which these statutes are intended to serve require that the prohibition be extended to the husband or wife of a legatee or devisee, that is a question of expediency rather than construction and so for the legislature instead of the court.

C. S. J.

WILLS: ORDER OF SUBSCRIPTION TO WILL BY TESTATOR AND WITNESSES.—It is said that some wills were recently unearthed in Egypt, made in 2250 B. C., witnessed by two scribes and with attestation clauses. Though the practice of formal execution is so ancient, it seems that not all questions connected even with the form of execution of wills have been settled.

A recent Colorado case¹ holding that the order of subscription by a testator and witnesses was immaterial, dismisses the subject in rather a summary manner. In fact, authority upon the question is very evenly divided.² The English courts,³ and

¹In re Carey's Estate, (Dec. 1, 1913) 136 Pac. 1175.

²Testator must sign first:—Brooks v. Woodson, (1891) 87 Ga. 379; 13 S. E. 712; 14 L. R. A. 160; Reed v. Watson, (1867) 27 Ind. 443; Marshall v. Mason, (1900) 176 Mass. 216; 57 N. E. 340; Lacey v. Dobbs, (1901) 63 N. J. Eq. 325, 50 Atl. 497, 55 L. R. A. 580; Jackson v. Jackson, (1868) 39 N. Y. 153.

Contra:—O'Brien v. Galagher, (1858) 25 Conn. 229; Gibson v. Nelson, (1899) 181 Ill. 122, 57 N. E. 901, 72 Am. St. Rep. 254; Swift v. Wiley, (1840) 1 B. Mon. 117; In re Horn, (1910) 161 Mich. 20; 125 N. W. 969, 20 A. & E. Ann. Cas. 1364; Cutler v. Cutler, (1902) 130 N. Car. 1, 40 S. E. 689; Kaufman v. Caughman, (1897) 49 S. Car. 159; 27 S. E. 16, 61 Am. St. Rep. 808; Rosser v. Franklin, (1849) 6 Gratt 1, 52 Am. Dec. 97.

³Hindmarsh v. Charlton, (1861) 8 H. L. C. 160; Moore v. King, (1842) 3 Curt. 243.

the courts of such important jurisdictions as New York, New Jersey and Massachusetts, hold that a signature by the witnesses preceding the testator's signature by any lapse of time is an insufficient compliance with the statutes of wills. Whether the will,⁴ or whether the signature⁵ is the thing to be attested the reasoning of these courts is, in effect, that one cannot witness a thing which does not exist or an event that has not happened.

Other American courts consider that this doctrine is too narrow, and that where the testator's signature follows the witnesses immediately, the two acts may be justly regarded as one transaction.⁶ Even these jurisdictions, however, agree in holding that the signature by the witnesses to an unsigned will, out of the testator's presence or on a different occasion is insufficient.⁷

One case in California deals in rather an unsatisfactory way with the question. The facts in the case of *Estate of Johnson*⁸ were not very clearly established,—to use the Court's expression, there was "some indefiniteness as to the witnessing of the will." One of the subscribing witnesses testified that the requirements were followed, according to the stricter test, while the other witness thought that the testator did not publish and declare the instrument to be his will until both testator and the witnesses had signed. Under such circumstances, it would seem that the finding of the lower court should not be disturbed in the face of the conflict in the testimony, especially in view of the fact that the witness did not testify that he did not have knowledge from the testator's acts that the instrument was a will. No question, therefore, can be made as to the correctness of the decision. The case cannot, under the circumstances, be said to be a clear authority to the effect that the order of execution is not material, if everything took place on one occasion. The statement of the court to this effect refers to two New York cases upon the subject. One of the New York cases, decided by a Surrogate does sustain the proposition laid down by the Court in *Estate of Johnson*, but it was overruled by the later case⁹ in the Court of Appeals, cited also by the court, which holds precisely the opposite to the point for which it is cited. The section of the Civil Code¹⁰ dealing with the execution of wills was adopted from the New York Statutes in 1872 in place of the very

⁴ *Ellis v. Smith*, (1754) 1 Ves. Jr. 11; *Reed v. Watson*, (1867) 27 Ind. 443.

⁵ *Goods of Gunstan*, (1882) 7 P. D. 102; *Jackson v. Jackson*, (1868) 39 N. Y. 153.

⁶ *In re Horn*, *supra*, note 2.

⁷ *Ragland v. Huntington*, (1841) 1 Ired. L. (23 N. Car.) 563.

⁸ *Estate of Johnson*, (1881) 57 Cal. 529.

⁹ *Jackson v. Jackson*, (1868) 39 N. Y. 153.

¹⁰ Cal. C. C. secs. 1270 et seq.

different statute theretofore existing. Upon the well known principle that where a statute of one state is adopted by another state, the judicial interpretation of that statute is also adopted,¹¹ the ruling of the New York Court of Appeals in 1868 to the effect that the testator should sign first ought to be controlling in California. And it cannot be said that Estate of Johnson, in view of its unsatisfactory character, has settled the law differently for this jurisdiction.

J. C. A.

¹¹ Pratt v. American Bell Telephone Co., (1886) 141 Mass. 225, 5 N. E. 307, 55 Am. Rep. 465, 36 Cyc. note 81, p. 1154.